Appeal from Appellate Decree No.246 OF 1990

Against the judgment and decree dated 15.5.1990 passed by Sri Sohailur Rahman, Sixth Additional District Judge, Arrah in Title Appeal No. 51 of 1987 upholding the judgment and decree dated 5.6.1987 passed by Sri Basudeo Pandey, 2nd Additional Munsif, Arrah in Title Suit No. 1 of 1987/167 of 1979.

SHREEPATI AHIR & ORS ----------Appellants

Versus

JWALA UPADHAYA & ORS---------- Respondents

For the Appellants : M/s Meera Kumari, Adv.
Ashok Kr. Sah, Adv.

For the respondents : None

P R E S E N T

THE HON'BLE MR. JUSTICE GHANSHYAM PRASAD

Ghanshyam Prasad,J.

1. This appeal by defendant has been preferred against the judgment and decree dated 15th May 1990 passed by Sixth Addl. District Judge, Arrah in Title Appeal No. 51 of 1987 thereby he has dismissed the appeal and confirmed the judgment & decree dated 5.6.1987 passed by Additional Munsif, II, Arrah in Title Suit No. 167 of 1979/1 of 1987.

2. The facts leading to this appeal are as follows;-

The plaintiffs-respondents filed the above suit against the defendant/appellant for declaration of his title and removal of encroachment over the suit land, detailed at the foot of the plaint, as well as for injunction restraining the defendant from making any construction over the land. The learned

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Additional Munsif held trial and ultimately decreed the suit as a whole. Being aggrieved by the judgment of additional Munsif, the defendant preferred appeal before the District Judge. The appeal was ultimately heard by Additional District Judge, VI who dismissed the same and confirmed the judgment of the trial Court. Thereafter, the defendant has preferred this second appeal.

3. The case of the plaintiff in brief is that there was a Gairmajarua Maliki land bearing C. S. Plot no. 1263 contiguous South of his house. After abolition of zamindari the land was vested in the State of Bihar. In revisional survey the same was numbered as plot no. 1577. The further case is that the uncle of the plaintiff Ram Chandra Upadhaya was the karta of the family who took settlement of 43 decimals of land out of plot no. 1577, detailed in schedule 1 of the plaint, over which he came in possession by paying rent to the State of Bihar. The defendant has his ancestral house over plot no. 1771. He gradually by making construction encroached upon the portion of the land of the plaintiff and hence the suit.

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4. The suit was contested by the defendant no. 1 Harakh Ahir.He denied the story of settlement of 43 decimals out of plot no. 1577 in favour of plaintiff's uncle. However, he

has admitted that his ancestral house was situated over plot no. 1571 but with the increase in number of family members he constructed the house over Gair-Majarua land about 20 years ago and since then he is coming in possession and thus he has perfected his title by adverse possession. It is further averred that he is a privileged person and, therefore, his possession is protected under the Bihar Privileged Homestead Tenancy Act. It is further averred that the plaintiff tried to evict the defendant by filing the case under Bihar Land Encroachment Act in the Court of DCLR who after finding possession has recommended for settlement in his favour. Hence prays for dismissal of the suit.

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5. Learned trial Court framed six issues. However, the main issue is issue no. 3 “are the suit plots settled land of the plaintiff and has he got title over the same?”

6. Trial Court after consideration of oral as well as documentary evidence adduced by both the parties decided the suit in favour of the plaintiff and accordingly decreed the suit.

7. The learned first Appellate Court for the purpose of decision of the appeal framed only two points which are as follows;-

(i) Is the plaintiff-respondent is

entitled to a decree for declaration of his title in respect of the suit land and for removal of encroachment made by the defendant-appellant?

(ii) Can the judgment and decree of the learned trial Court be sustained either in fact or law?

8. The learned appellate Court after reappraisal of the evidence upheld the judgment of the trial Court. Thus, there a concurrent finding of both the courts on the point of title of the plaintiff-respondent and the encroachment by defendant-appellant on portion of the land of the plaintiff.

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9. At the time of admission of this Second Appeal, this Court formulated substantial questions of law which are as follows;-

(i) Whether a civil Court is legally empowered to adjudicate by passing any decree in respect of a land which is admittedly a public land within the

meaning of Bihar Public Land Encroachment Act ?

(ii) Whether the Courts below were right to decree the suit between the two private parties without impleading the State of Bihar as a party in view of the fact that the suit land belong to the State of Bihar ?

(iii) Is the land encroached by the appellant part and parcel of the land said to be settled with the respondent ?

Issues Nos. (i), (ii) and (iii)

10. From the pleadings of the parties as well as issues and points framed by the Courts below it is clear that this case is entirely based on the facts alleged and controverted by the parties. As said above there is a concurrent finding of fact of both the courts on the material issue.

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11. Section 100 C.P.C. limits the power of the High Court to interfere in the concurrent finding of the lower Court. The decision of this appeal is mainly based on decision on point no. III formulated by the High Court. This is purely question of fact. Therefore, the main question is whether this Court has right to interfere in the concurrent finding of the lower Court

12. There are catena of decisions of the Hon'ble Apex Court on this point. It is needless to quote all those decisions. However, I tempted to cite two decisions of the Hon'ble Apex Court which would clintch the issue. Those decisions have been reported in 1996(3) SCC page 392: Ramanuja Naidu v. V. Kanniah Naidu and 2001 SC 2920: Verrayee Ammal v. Seeni Ammal.

13. In the above decision of 1996 the scope of section 100 Cr.P.C. has been discussed with reference to several earlier pronouncements. Paragraph 7, 9 and 10 are relevant on this point which are as follows:-

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> "7. The scope of Section 100 of Civil Procedure Code even before the amendment of the Section in 1976 has been neatly summarized in Mulla's Code of Civil Procedure (15th Edn. Vol.I) at p. 703. It is stated therein as follows;
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> " The section even as it stood before its recent amendment allowed a second appeal only on the grounds set up in clauses (a), (b) or (c). Therefore, whereas a Court of First Appeal is competent to enter into questions of fact and decide for itself whether the findings of fact by the lower Court are or are not erroneous, a Court of Second Appeal was not and is not competent to entertain the question as to the soundness of a finding of fact by the Court below. A second appeal, accordingly, could lie only on one or the other grounds specified in the section.
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> As held in Durga Choudhrain V. Jawahir Singh by the Privy Council, there is no jurisdiction to entertain a second appeal on the ground of erroneous finding of facts,

however gross in error they may seem to be. The same view has been expressed also by the Supreme Court. No doubt, a second appeal lay where there was a substantial error or defect in procedure under clause (c), but an erroneous finding of fact is distinct from an error or defect in procedure. Accordingly, where there was no error or defect in procedure, the finding of the First Appellate Court upon a question of fact had to be regarded as final, if that court had before it evidence proper for its consideration in support of the finding, …….The mere fact that the High Court would have upon documents and evidence placed before the Court of First Appeal come to a different conclusion is no ground for a second appeal."

9. In Dudh Nath Pandey V. Suresh Chandra Bhattasali, a Bench of this Court held that; (SCC Headnote p. 360)

"High Court cannot set aside findings of fact of first appellate Court and come to a different conclusion on reappraisal of evidence."

10. There are innumerable subsequent decisions of this Court which have held that concurrent findings of fact of trial Court and first appellate Court cannot be interfered with by the High Court in exercise of its jurisdiction under Section 100 of Civil Procedure Code. (See; Kamala Devi Budhia v. Hem Prabha Ganguli, Jahejo Devi v. Moharam Ali, P. Velayudhan v. Kurungot Imbichia Moidu's son Ayammad, etc.)"

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14. The other decisions reported in 2001 is also important to decide this appeal on other points. Paragraph 9 and 10 are relevant which are as follows;

"9. In Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, 1999 (3) JT (SC) 163, this Court

again considered this aspect of the matter and held:

" If the question of law termed as substantial question stands already decided by a large Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the appellate Court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as substantial question of law. Where the first appellate Court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. This Court in Reserve Bank of India v. Ramakrishna Govind Morey (AIR 1976 SC 830) held that whether trial court should not have exercised its jurisdiction differently is not a question of law justifying interference."

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10. The question of law formulated as substantial question of law in the instant case cannot, in any way, be termed to be a question of laws much less as substantial question of law. The question formulated in fact is a question of fact. Merely because of appreciation of evidence another view is also possible would not clothe the High Court to assume the jurisdiction by terming the question as substantial question of law. In this case Issue no. 1, as framed by the trial Court, was , admittedly, an issue of fact which was concurrently held in favour of the appellant-plaintiff and did not justify the High Court to

> disturb the same by substituting its own finding for the findings of the courts below, arrived at on appreciation of evidence."

15. Thus, in the light of above pronouncements of the Apex Court regarding scope of Section 100 C.P.C. this Court finds itself unable to interfere in the concurrent finding of the lower Courts on the point of settlement and encroachment. Accordingly, point no. III is answered against the defendant/appellant and in favour of plaintiff/respondent.

16. So far as point no. 1 is concerned, it is nowhere claimed in the written statement that land in question is public property. There is a specific case of plaintiff-respondent that the land in question was originally Gairmajarua Maliki land which after abolition of zamindari vested in the State of Bihar and in revisional survey it has been recorded as such. This fact has not been denied. On the other hand in paragraph 12 (Ka) of the written statement the defendant-appellant has claimed it as a homestead land. Ext. 3 report of the Amin, Ext. 6 the order passed by C.O., Badahars in Case No. 36 of 1964-65, Ext. 3/A the report of the Karmchari and Ext 1 series rent receipts would also go to show that the land in question is not a public land i.e. Gairmajarua Ama. The State of Bihar after settlement is also granting rent receipts to the plaintiff-respondent regularly.

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17. Thus, in view of the above discussions, it is quite clear that the land in question is not a public land. Therefore, there was no hindrance with the lower Courts to adjudicate the matter in question.

18. In view of the findings of the lower courts that the land in question is not a public land and the same has been settled by the State of Bihar in favour of plaintiff-respondent the question of suit bad for non-impleading the State as defendant does not arise. The dispute is between the plaintiff and defendant over certain piece of land which is claimed to be plaintiff's settled land. No relief has been claimed against the State. Therefore, apparently the State is not necessary party to the suit. The basic principle is that the plaintiff who is dominus litis of the suit cannot be compelled to contest against the party against whom he does not wish to contest and claim any reliev.

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19. In view of the above, I am of the opinion that non-impleadment of the State of Bihar does not affect the merit of the suit. This point is accordingly answered against the defendant/appellant.

20. In view of above discussions, it is quite apparent that there are sufficient materials on the record to sustain the verdict rendered by the lower courts. Even taking

into consideration the documents sought to be admitted as additional evidence by the defendant-appellant is not going to affect the finding of the lower courts. Accordingly, I find no merit in the I. A. No. 3366 of 2006 and 5583 of 2006 and hence rejected.

21. In the result, this appeal is dismissed on contest with cost.

22. Lawyer's Fee Rs.250/- and Lawyer's Clerk's Fee Rs.50/- only allowed.

Ghanshyam Prasad, J.)

Patna High Court
Dated the 22nd July, 2008
N.A.F.R./Kanchan

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